

# Should the ECtHR Consider Turkey's Criminal Peace Judgeships a Viable Domestic Avenue?

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Turkey has seen an erosion of democracy in recent years, particularly since the July 2016 coup attempt. [Since then](#), 142,874 people have been detained and 81,417 arrested on trumped-up terrorism charges. Thousands of organisations have been shut down or appointed state-aligned trustees. As such, the European Court of Human Rights (ECtHR) has received over 33,000 applications from the country. However, more than 90% [have been rejected](#), many on the basis that they have yet to exhaust viable domestic avenues. This is a conundrum when there is no viable domestic judicial system that is independent from the state. Of notable concern is the Criminal Peace Judgeships (CPJ). Thousands of complaints arising from the CPJ await ECtHR ruling. The decision on these will influence future Turkish applications *vis-à-vis* domestic viability.

The ECtHR has not revealed how viability is evaluated. Be that as it may, as a signatory to the [European Convention on Human Rights](#), Turkey must adhere to the relevant articles. Of note is: Article 5, the right to liberty and security; and Article 6, the right to a fair trial. The former provides for lawful detention in cases of conviction or significant risk determined by a competent court. The latter provides for a lawful trial, which must be conducted “by an independent and impartial tribunal” with adequate assistance to defence for one presumed innocent until proven guilty. Independence of a court is consequently a vital factor. [Past ECtHR case law](#) to determine judicial independence has examined: guarantees against external factors; the appearance of independence; how members are appointed; and security of tenure. So, does the CPJ meet this criterion?

## Establishing the CPJ

The CPJ was established in June 2014 with the exclusive authority to authorise searches, seizures, appointments of trustees, disclaimer trials, pre-trial detention and release or continuation of detention. Appeals can only be taken by another CPJ, a closed-circuit system. An understanding of the context in which the CPJ were established is necessary; that is, in the context of the December 2013 [corruption probe](#). This was an investigation launched into prominent businessmen, ministers and ministers' family, including then Prime Minister Erdoğan's son. The ruling Justice and Development Party (AKP) was quick to blame the faith-based Gülen Movement, calling it a 'parallel state' which had launched the corruption investigation as a 'coup attempt'.

Legislation to form the CPJ was passed explicitly to deal with this 'parallel state' which was alleged to have 'infiltrated' various sectors. Erdoğan [stated](#): *"In the context of the fight against parallel structure, appointments in regard to criminal peace judgeships were made. As of tomorrow, they will take office. We will see what will happen in police and judiciary"*. Other interferences with the judicial system occurred in this period. Of most significance, election to the High Council of Judges and Prosecutors (HSK) – the authority that provides investigations and disciplinary measures against judges and prosecutors – was manipulated via [intimidation](#) and [bribery](#) to ensure that members were submissive to the state.

Following the 2016 coup attempt, also blamed on the Gülen Movement, alignment of the HSK to the state became overt. Within 12 hours, five HSK members were dismissed. Further dismissals followed. The final nail in the coffin was the April 2017 referendum, which alongside granting President Erdoğan extensive powers, [changed the HSK composition](#). Membership was halved to 13 people, six of whom are appointed directly by the President with the remaining seven appointed by parliament. Considering that the AKP party has the parliamentary majority and is led by the President, the President now effectively has the authority to elect every member. The non-independence of the HSK is relevant as they can punish or reward judges and prosecutors. And, the majority of Criminal Peace Judges are appointed by the HSK.

## Non-Independent from Day One

As soon as the CPJ entered into force in 2014, they were used to persecute alleged Gülen Movement members. An order for detention and seizure was issued against 100 police officers [on the very first day](#). Then judges and prosecutors working on the corruption probe began to be transferred or dismissed. The state rhetoric that they were part of the 'parallel state' continued, whilst the evidence of corruption was overlooked. Indeed, the Criminal Peace Judge Hulusi Pur, who released six prominent men accused of corruption, was promoted. There were similar occurrences in subsequent political cases, such as the investigation into the National Intelligence Agency (MİT) trucks [allegedly carrying arms](#) to Syria.

This is despite the Turkish Constitution declaring that the HSK *"shall be established and shall exercise its functions in accordance with the principles of the independence of the courts and the security of the tenure of judges"* (Art 159 § 1). A critical indicator of judicial independence is the irremovability of judges. Removal is only possible if: they are appointed to a higher court; they make a personal request; or they are suspended or dismissed for serious criminal behaviour proved by a fair trial. But since 2014, [numerous judges](#) have been removed outside of these regulations. In 2015, Criminal Peace Judge Kemal Karanfil attempted the case that the CPJ were not independent; he was then [transferred](#). Needless to say, the case was unsuccessful.

## Impact of the 2016 Coup Attempt

Abuse of the CPJ increased after the coup attempt. Between 15 July 2016 and 1 May 2018, more than [70,000 people](#) were arrested by the Judgeships. Transfers of those whom made unfavourable decisions continued unabated. For instance, Chief Justice Enol Demir was transferred in 2017 after deciding that using the [ByLock messaging application](#) was insufficient evidence for terrorist organisation membership. Chief Justices Zafer Yarar and Mustafa Tosun were transferred on the same grounds. What is more, emergency decree no.667 was enacted; this stipulates that judges and prosecutors may be permanently discharged by the state without legal proceedings.

[4,463](#) judges and prosecutors have been arbitrarily dismissed since. Despite the state of emergency ceasing in July 2018, the decree will remain in effect for another three years. As articulated by the [Venice Commission](#) in 2017; *“Such dismissals may create a ‘chilling effect’ within the judiciary, making other judges reluctant to reverse measures declared under the emergency decree laws out of fear of becoming subjects of such measures themselves. These measures may have adverse effects on the independence of the judiciary”*.

## Unable to Release Dissenters

It has now become easier for judges to be criminally persecuted if they dissent. [On 1 February 2017](#) Chief Judge Fatih Mehmet Aksoy, regarding dozens of suspects facing an unfair trial, decried, *“I cannot bear it any more, I will set all of them free.”* Upon this, the prosecutor threatened the Chief Judge: *“If you do that, I will have you arrested in two hours for using ByLock”*. Sure enough, this arrest was executed within two hours. Aksoy was then suspended until 31 December 2017 when it was ascertained that he was in fact not a ByLock user. Alike this, thousands of judges and prosecutors have been arrested.

Criminal Peace Judges are too subjected to persecution if they make an unfavourable decision; say, for deciding to release someone considered a ‘parallel state’ member. The aforementioned Criminal Peace Judge Kemal Karanfil was [eventually arrested](#) on coup-related terrorist charges. Political trials are monitored by the police, intelligence officers, and ruling party. Erdoğan [has openly admitted](#) to receiving daily reports. Consequently, the judiciary is intimidated into making decisions consistent with the will of the state.

Unfavourable release decisions are often disregarded. Infamously, Amnesty International’s Turkey Chair [Taner Kılıç](#) was detained on terrorist charges. On the 31 January 2018, after spending eight months in detention, a release decision was given. [Kılıç](#) was kept at a police station overnight; by the following day the release decision was overturned. Another prominent case is that of journalists [Mehmet Altan and #ahin Alpay](#). On 11 January 2018, the Constitutional Court decided that they should be released as their freedom of expression and right to liberty had been

breached. Nonetheless, six different lower courts did not comply, ordering continued detention. The ECtHR had to intervene.

## External Pressures

On 31 March 2017, 21 journalists were granted release. Pro-government journalists were enraged, taking to social media to call out the traitorous judiciary. Immediately, the journalists had new arrest warrants issued against them. The judges and a prosecutor who had ruled for release were suspended. Deputy President Mehmet Yılmaz [justified these actions](#); “[the release ruling] *has caused public indignation and wounded public conscience*”. And these are not isolated incidents. The impact of ‘public opinion’ and state intervention is contrary to an important indicator of judicial independence; protection from external pressures.

The state opines a biased stance, disregarding innocence until proven guilty. Comments surrounding ‘complete eradication of the parallel structure’ and that ‘the traitors must be heavily punished’ [are common](#). This undoubtedly impacts the ability for the judiciary to make independent decisions when the ruling party has complete control of the HSK and have clearly enunciated that they are monitoring trials. [As noted](#) by the European Commission this year: “*The perceived influence of the executive over [CPJ] decisions and their jurisdiction and practice continue raising serious concerns*”.

A prime illustration is the Turkish Medical Association’s January 2018 statement against the Afrin Operation in Syria. [Erdoğan accused](#) the signatories as being “*terrorist-lovers*”. Subsequently, members were detained for ‘terrorist propaganda’. Human rights lawyer [Dr. Kerem Altıparmak](#) expressed: “*Whenever the President Erdoğan calls someone “terrorist, spy, traitor”, prosecutors and courts receive his speech as an order. The last victims of this routine are eleven members of the Turkish Medical Association Central Council*”. Similarly, the AKP determines who may be released, apparent in the case of Turkish-German journalist Deniz Yücel who was arrested in February 2017. The following February, within a day of Turkish Prime Minister Erdoğan meeting German Chancellor Merkel to discuss the situation, Yücel was released. He himself [acknowledged](#): “*neither my jailing... nor my release today is in accordance with the rule of law at all*”.

## A Non-Viable Avenue

From this, it is easy to conclude that Turkey’s CPJ are not independent and should not be considered a viable domestic avenue. However, whether the ECtHR will reach the same consensus is less clear. Many ECtHR-Turkey rulings [have drawn disappointment](#), particularly the decision to consider the State of Emergency Commission a viable domestic avenue. This Commission was proposed by Secretary-General of the Council of Europe Thorbjørn Jagland during a meeting with Justice Minister Bekir Bozdağ. It appears that ‘diplomacy’ and communication with the Turkish state has influenced ECtHR decisions. Following on from this, Erdoğan recently [commented](#): “*We are determined to strengthen the functioning*

*of an independent and impartial judiciary in real terms which sets goals for the continuation of unity and peace for the people*". It can be deduced that this was a strategic statement.

Furthermore, it is disadvantageous that the ECtHR has not publicised how the viability of a domestic avenue is determined. Nevertheless, independence from the state is an absolute necessity. This is provided by Article 5 and Article 6 of the European Convention on Human Rights, to which Turkey is signatory. Prior ECtHR case law reveals how independence should be assessed. Based on the evidence surrounding Turkey's Criminal Peace Judgeships, they cannot be said to meet this criterion. Thus, they cannot be said to be a viable domestic avenue.

